A

ONG SEE TEONG & ANOR

v.

TENAGA NASIONAL BHD

B

COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
ZAINUN ALI JCA
AHMAD MAAROP JCA
[CIVIL APPEAL NO: W-02-1069-07]

C

10 FEBRUARY 2009

ADMINISTRATIVE LAW: *Exercise of administrative powers - Judicial review - Issuance of notice under s. 13 Electricity Supply Act 1990 permitting respondent to enter appellant's land in order to carry out*

D

upgrading works - Whether notice irrational and procedurally improper - Contravention of constitutional rights - Public interest - Pleadings - Error of law

ADMINISTRATIVE LAW: *Exercise of administrative powers - Local authority - Issuance of notice under s. 13 Electricity Supply Act 1990*

E

permitting respondent to enter appellant's land in order to carry out upgrading works - Whether notice irrational and procedurally improper - Contravention of constitutional rights - Public interest - Pleadings - Error of law

F

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Issuance of notice under s. 13 Electricity Supply Act 1990 permitting respondent to enter appellant's land in order to carry out upgrading works - Whether notice irrational and procedurally improper - Contravention of constitutional rights - Public interest - Pleadings - Error of law*

G

PUBLIC UTILITIES: *Electricity - Local authority - Issuance of notice under s. 13 Electricity Supply Act 1990 permitting respondent to enter appellant's land in order to carry out upgrading works - Whether notice irrational and procedurally improper - Contravention of constitutional*

H

rights - Public interest - Pleadings - Error of law

LOCAL GOVERNMENT: *Electricity - Local authority - Issuance of notice under s. 13 Electricity Supply Act 1990 permitting respondent to enter appellant's land in order to carry out upgrading works - Whether*

I

notice irrational and procedurally improper - Contravention of constitutional rights - Public interest - Pleadings - Error of law

CONSTITUTIONAL LAW: *Right to property - Federal Constitution, art. 13 - Issuance of notice under s. 13 Electricity Supply Act 1990 permitting respondent to enter appellant's land in order to carry out upgrading works - Whether notice irrational and procedurally improper - Contravention of constitutional rights - Public interest - Pleadings - Error of law*

CIVIL PROCEDURE: *Pleadings - Issue not pleaded - Whether courts more concerned with justice of matter rather than being overly concerned with format or procedure - Whether submission on issue ought to be allowed*

The appellants applied under O. 53 of the Rules of the High Court 1980 for a judicial review of the respondent's decision dated 21 June 2007, which decision came in the form of a notice issued by the respondent under s. 13 of the Electricity Supply Act 1990 ('s. 13 notice'). The s. 13 notice sought to permit the respondent to enter the premises owned by the appellants ('said land') in order to carry out upgrading works of the distribution supply lines and other works incidental thereto. The appellants, representing themselves and 23 other owners or occupiers, sought an order of *certiorari* to quash the decision of the respondent in issuing the s. 13 notice and a declaration that its issuance was null and void. They relied on the ground that the decision pursuant to the s. 13 notice was illegal, being *ultra vires* both procedurally and substantively. It was alleged that the s. 13 notice, which did not merely permit the respondent to carry out and complete the proposed work, was irrational and violated the rule of proportionality, having failed to take into consideration relevant matters. The High Court dismissed the appellants' application, resulting in the present appeal. The issue that needed determination was whether the s. 13 notice was correct or not in the circumstances of this case.

Held (allowing the appeal)
Per Suriyadi Halim Omar JCA delivering the judgment of the court:

(1) The s. 13 notice was flawed for irrationality and/or being procedurally improper, and inevitably fell under the principle of "errors of law". On the facts, both the previous Government and the incumbent one, in the interest of the appellants and 23 others, had suggested either the acquisition of the said

land or to consider alternative routes. Despite this, the respondent irrationally and unreasonably persisted to enforce the s. 13 notice. Apart from the reasons held by the current State Government as to why an alternative route ought to be considered, the factual evidence also revealed the irrationality of not acquiring the said land. The appellants would have to live in fear under the giant pylons that overhung their houses day in and day out after the construction was completed. Needless to say, prior to the completion of those structures, the appellants would have to put up with huge machinery and other infractions by the respondent's workers. The evidence adduced also confirmed the negative medical effect on people and, especially, children. Despite these hazardous life-threatening factors, the respondent ventilated that money would be adequate compensation for the appellants' discomfort. The compensation received by the appellants was supposed to mollify them for living under the pylons with all the hidden dangers that had not been explained to them. The respondent would eventually reap the benefits of their displacement without much effort and expense when the appellants eventually abandoned their homes for fear of their health and lives. This subtle and unconscionable way of driving and depriving the appellants of their property, hence in effect an acquisition of their land by the respondent (a power exercisable only by the State Authority), surely would contravene their constitutional rights (art. 13 of the Federal Constitution). (paras 10 & 12)

(2) The respondent's argument that public interest must override the grievances of the appellants sounded hollow when there were alternative ways to solve the problem. There was even evidence to show that, apart from the views held by the incumbent State Government, even the respondent at one point of time did agree to consider this alternative suggestion. Unfortunately, for reasons not divulged satisfactorily the respondent reneged on its promise. That being so, in the circumstances of the present case this point held no water. (para 14)

(3) One final matter requiring attention was the respondent's complaint that the pleadings did not state anything about the s. 13 notice suffering errors of law. Even if the respondent were right, it is trite that the courts are more concerned with the justice of the matter rather than being overly concerned with format or procedure. That being so, the appellant was allowed to submit on this issue. Having scrutinised the notes of proceedings and the submissions, at no time was the respondent caught flat-footed or prevented from replying to this so-called unpleaded issue. The respondent was sufficiently put on notice of this argument every step of the way, and any submission of being caught unaware and unprepared was, thus, without merit. (para 15)

(4) With the pleading matter resolved, and what the s. 13 notice entailed, together with the disproportionate sufferings to be experienced by the appellants at the hands of the respondent, by no account could it be said that it had been issued without any error of law. Based on the above reasons, the appeal was, therefore, allowed. (para 16)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu memohon di bawah A. 53 Kaedah-kaedah Mahkamah Tinggi 1980 untuk suatu semakan kehakiman keputusan responden bertarikh 21 Jun 2007, di mana keputusan itu ialah dalam bentuk sesuatu notis yang dikeluarkan oleh responden di bawah s. 13 Akta Bekalan Elektrik 1990 ('notis s. 13'). Notis s. 13 cuba membenarkan responden memasuki premis yang dimiliki oleh perayu-perayu ('tanah tersebut') untuk menjalankan kerja-kerja meningkatkan talian-talian mengedar bekalan dan lain-lain kerja sampingan. Perayu-perayu, mewakili diri mereka dan 23 pemilik atau penghuni lain, meminta suatu perintah *certiorari* untuk membatalkan keputusan responden dalam mengeluarkan notis s. 13 dan suatu deklarasi bahawa pengeluarannya batal dan tak sah. Mereka mengharapkan alasan bahawa keputusan yang dibuat mengikut notis s. 13 menyalahi undang-undang, kerana ianya *ultra vires* secara prosedur dan substantif. Ia dikatakan bahawa notis s. 13, yang tidak hanya membenarkan responden menjalankan dan menyudahkan kerja-kerja yang dicadangkan, merupakan tidak rasional dan melanggar kanun perkadaran, kerana gagal mengambil dalam pertimbangan perkara-perkara relevan.

A Mahkamah Tinggi menolak permohonan perayu-perayu, mengakibatkan rayuan kini. Isu yang perlu diselesaikan ialah sama ada notis s. 13 ialah betul atau tidak memandangkan halkeadaan kes ini.

Diputuskan (membenarkan rayuan)

B **Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:**

(1) Notis s. 13 cacat kerana tidak rasional dan/atau tidak wajar secara prosedural, dan pastinya jatuh di bawah prinsip "kekhilafan undang-undang". Berdasarkan fakta-fakta, kedua-dua Kerajaan dulu dan pejawat kini, bagi kepentingan perayu-perayu dan 23 orang lain, telah mencadangkan perolehan tanah tersebut atau untuk mempertimbangkan jalan-jalan alternatif. Meskipun begitu, responden telah secara tidak rasional dan tidak munasabah terus memaksakan notis s. 13. Selain dari sebab-sebab yang diputuskan oleh Kerajaan Negeri kini kenapa suatu jalan alternatif patut dipertimbangkan, keterangan faktual juga mendedahkan keadaan tidak rasional tidak memperolehi tanah tersebut. Perayu-perayu akan hidup dalam ketakutan di bawah pilon-pilon yang amat besar yang menganjur rumah-rumah mereka setiap hari selepas pembinaan telah tamat. Tidak perlu dikatakan, sebelum penyudahan struktur-struktur itu, perayu mesti tahan dengan mesin-mesin yang sangat besar dan lain-lain pelanggaran oleh pekerja-pekerja responden. Keterangan yang dikemukakan juga mengesahkan kesan medikal yang negatif ke atas orang dan, terutamanya, kanak-kanak. Meskipun faktor-faktor mengancam hidup yang berbahaya ini, responden menyuarakan bahawa wang merupakan pampasan yang memadai bagi ketidakselesaan perayu-perayu. Pampasan yang diterima oleh perayu-perayu sepatutnya memujuk mereka hidup di bawah pilon-pilon itu dengan semua bahaya-bahaya tersembunyi yang tidak diterangkan kepada mereka. Responden akan akhirnya mengaup faedah-faedah perpindahan terpaksa mereka tanpa banyak usaha dan belanja apabila perayu-perayu akhirnya meninggalkan rumah-rumah mereka kerana takut akan kesihatan dan kehidupan mereka. Cara licik dan tidak berhati perut ini yang memaksa dan merampas harta daripada perayu-perayu, oleh itu merupakan sebenarnya suatu perolehan tanah mereka oleh responden (sesuatu kuasa yang hanya boleh digunakan oleh Pihak Berkuasa Negeri), semestinya akan melanggar hak-hak perlembagaan mereka (art. 13 Perlembagaan Persekutuan).

(2) Hujahan responden bahawa kepentingan awam mesti mengatasi kilanan perayu-perayu tidak bererti apabila ada cara-cara alternatif untuk menyelesaikan masalah itu. Terdapat juga keterangan yang menunjukkan bahawa, selain dari pandangan Kerajaan Negeri pejawat, responden juga pada suatu masa bersetuju untuk mempertimbangkan cadangan alternatif itu. Malangnya, untuk sebab-sebab yang tidak didedahkan dengan sepuasnya responden telah memungkiri janjinya. Oleh itu, dalam halkeadaan kes kini hujahan ini tidak ada merit.

(3) Satu perkara terakhir yang perlu dipertikaikan ialah aduan responden bahawa pliding tidak menyatakan apa-apa mengenai notis s. 13 mempunyai kekhilafan undang-undang. Jikapun responden betul, ia adalah mantap bahawa mahkamah lebih berminat dengan keadilan perkara berbanding dengan terlebih risau terhadap format ataupun prosedur. Oleh itu, perayu dibenarkan menghujah atas isu ini. Setelah meneliti nota-nota prosiding dan hujahan-hujahan, tiada mana-mana masa pun di mana responden terperanjat atau dihalang dari menjawab terhadap isu yang telah dikatakan tidak diplid ini. Responden telah diberi notis yang mencukupi mengenai hujahan ini pada setiap masa, dan apa-apa hujahan bahawa ia tidak tahu atau tidak bersedia, oleh itu, tidak mempunyai merit.

(4) Dengan perkara mengenai pliding sudah diselesaikan, dan apa yang notis s. 13 melibatkan, bersama dengan penderitaan yang tidak seimbang yang dilalui oleh perayu-perayu pada tangan responden, tidak sekali-kali boleh ia dikatakan bahawa ia telah dikeluarkan tanpa apa-apa kekhilafan undang-undang. Berdasarkan sebab-sebab di atas, rayuan ini, oleh itu, dibenarkan.

Case(s) referred to:

ACT Construction Ltd v. Customs and Excise Commissioners [1981] 1 WLR 1542 ***(refd)***

Council of Civil Service Unions And Others v. Minister for the Civil Service [1985] AC 374 ***(refd)***

OCBC Ltd v. Philip Wee Kee Puan [1984] 2 CLJ 4; [1984] 1 CLJ (Rep) 25 PC ***(refd)***

Superintendant of Lands and Surveys, 4th Division & Anor v. Hamit Matusin & Ors [1994] 3 CLJ 567 SC ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers' Union [1995] 2 CLJ 748 CA ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 25(2)
Electricity Supply Act 1990, s. 13
Federal Constitution, art. 13
Rules of the High Court 1980, O. 53

For the appellant - Malik Imtiaz Sarwar (William Leong, Neoh Hor Kee & Yap Soon Lee with him); M/s HC Tan & Zahani
For the respondent - Datuk Cyrus Das (Thiru & Shamsul Bahrin with him); M/s Shook Lin & Bok

[Appeal from High Court, Kuala Lumpur; Judicial Revision No: R2-25-177-2007]

Reported by Suresh Nathan

JUDGMENT

Suriyadi Halim Omar JCA:

[1] Before we heard the appeal proper, by consent of the respondent the appellants were granted leave to use fresh evidence for the appeal. By consent too a supplementary record of appeal was allowed to be filed. At the end of the hearing we unanimously allowed the appeal with costs.

[2] We now reproduce the antecedents and facts of this case. The appellants' application falls under O. 53 of RHC 1980 primarily for a judicial review of the respondent's decision dated 21 June 2007, which decision comes in the form of a notice (the singular is to denote plurality too) issued by the respondent under s. 13 of the Electricity Supply Act 1990 (the Act). The notice sought to permit the respondent to enter the premises (interchangeably referred to as the said land) owned by the appellants, in order to carry out upgrading works of the distribution supply lines, and other works incidental thereto.

[3] The relief sought for by the appellants was for an order of *certiorari* to quash the decision of the respondent in issuing the notice and a declaration that its issuance was null and void. Factually, the appellants and other residents of Kampung Sungai Terentang had occupied the land as licensees up until 1980s. Around late 1980s most of the residents were issued with titles to the land. Sometime in year 2005, the respondent began its upgrading exercise as part of its long term plan to enhance the electricity supply system under a project known as Central Area

Reinforcement (CAR). The project covered a total area of 60 km, divided into five five sectors, with the disputed stretch involving the said land forming 1.5km of the total 15km of the third sector. In a nutshell the land under consideration by us is small. The appellants had objected to the alleged upgrading after they had knowledge of that project in 2005. Thenceforth, up to 2007, numerous meetings were held between the relevant parties but despite these initiatives the appellants still received the impugned notice dated 21 June 2007.

[4] The appellants, who represented themselves and twenty three other owners or occupiers, had relied on the grounds that the decision was illegal, with the s. 13 of the Electricity Supply Act notice being inapplicable for the anticipated work. The respondent had stated that its intention was to upgrade the electrical facilities running across the appellants' land, but the latter had complained that the respondent had failed to take into consideration the proportionality and effect of its decision, wherein monetary compensation was inadequate. It was not denied that the respondent intended to construct within their lands a main supply line for the transmission of 275 kw high voltage electricity structures, to construct a five foot pathway reserve for inspection of the supply line, to use the existing access roads and lanes for the construction and completion of the works and thereafter to carry out maintenance, repairs and upgrading of the installations from time to time.

[5] The filing of the action by the appellants, in brief was founded on the ground that the decision pursuant to the s. 13 notice was illegal, being *ultra vires* both on procedural and substantive ground. The notice, it was alleged, which did not merely permit the respondent to carry out and complete the type and proposed work, was irrational and violating the rule of proportionality, having failed to take into consideration relevant matters, and had also failed to take into consideration an alternative route. Leave was granted by the High Court on 28 September 2007, for the appellants to proceed with the application (encl. 1) but was dismissed on 7 December 2007. Being dissatisfied a notice of appeal was filed on that same date.

[6] The learned judge when dismissing the application had found that the grounds of the application were too general and lacked the necessary precision. In the course of the hearing new grounds were raised by the appellant, matters which were not pleaded in their statement. The learned judge concluded that this was fatal as parties were bound by the four corners of their pleadings. Despite arriving at that conclusion the judge however proceeded to discuss the new grounds in the event she was found wrong in her conclusion.

[7] The court, *inter alia* when supplying its reasons viewed that the s. 13 notice was meant for "maintenance, repair and upgrading of installation", and entry on the said land depended on the existence of posts, which had been erected lawfully. On this issue she found that the appellants did not dispute the fact that the posts had been erected as early as 1974-75, and LLN was allowed by the State Government to enter into the said land for the purpose of carrying out the installation works. From the conclusion of the learned judge, it was obvious that she found the intended construction or works carried out on the land, were for the purpose of maintaining, repairing or upgrading any installation on it. The learned judge further opined that the construction of transmission lines from 33kw to 275kw, together with the other peripheral actions, fell under the definition of upgrading rather than a major reconstruction. The issuance of the notice thus fell correctly within the procedure and purpose envisaged in the relevant provision.

[8] At the conclusion of the hearing the learned judge summarised the matter by enunciating that the whole *substratum* of the case was founded on public interest. She found that the main objective of the CAR project was to prevent disruption of electricity supply which had happened nationwide on 13 January 2005. For this purpose, the public interest certainly would outweigh the private interests of the appellants. Based on the aforesaid reasons, the learned judge concluded that the appellants had not made out a case for judicial review on the grounds sought, and accordingly dismissed the application with costs.

[9] On the aspect of the principles governing judicial view, we found no reason to disagree with the learned judge's comments that the High Court merely exercises supervisory jurisdiction in judicial review proceedings over the decisions of public authorities

and administrative bodies (s. 25(2) of the Courts of Judicature Act 1964 read together with para 1 of the Schedule). In this case the respondent is treated as a public authority for review purposes. The learned judge correctly stated that in any judicial review proceedings the role of the High Court is to detect whether the decision making process by the public authorities or administrative body is infected by errors of law or not. The errors of law would include illegality, irrationality and procedural impropriety (*Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers' Union* [1995] 2 CLJ 748; *Council of Civil Service Unions And Others v. Minister for the Civil Service* [1985] AC 374).

[10] After scrutinizing the application and the supporting statement, documentary evidence, and the submission be it written or oral we concluded that the matter before us was not too complicated. In a gist we had to decide whether with the facts before us, the s. 13 notice in the circumstances of the case was correct or not. Having perused the evidence adduced at the High Court and the recently adduced fresh evidence, we could not help but conclude that the notice was flawed for irrationality and or being procedurally improper, and inevitably falling under the principle of 'errors of law'.

[11] The antecedents of this case showed that on 23 May 2007 Dato' Seri Dr Lim Keng Yaik the Minister of Energy, Communications and Multimedia directed the respondent to consider the feasibility of using an alternative route. On 27 December 2007 the State Government of Selangor declared vide gazette no. 3528 its intention to acquire some of the said land. This gazette was issued at the time when the Barisan Nasional Government was ruling the State of Selangor. Come March 2008 the Pakatan Rakyat Government took over the governance of the State. This new government also saw it fit to appoint external consultants to study the viability of an alternative route and the impact of the pylons pursuant to the construction of their superstructure, on the residents of Kampung Sungai Terentang. On 3 December 2008 the State Government of Selangor abandoned the idea of acquiring the impugned land, and stated that after due discussion with the relevant consultants, and after taking into consideration the interests of all the affected parties, the respondent ought to take an alternative route.

[12] Gauging from the above paragraph it was quite clear that either the previous Government or the incumbent one, in the interest of the appellants and 23 others, had suggested either the acquisition of the said lands or to consider alternative routes. Despite all the studies and sanity prevailing, the respondent irrationally and unreasonably persisted to enforce the s. 13 notice. Apart from the reasons held by the current State Government why an alternative route ought to be considered, the factual evidence conspicuously also revealed the irrationality of not acquiring the lands involved. Let us analyse the neutral evidence adduced which comes in the form of the tendered pictures (RR 550 to 554). These pictures highlight the difference in sizes between an LLN 33kw post (an original post) and the gigantic new TNB 275kw transmission tower. It would be impossible to put on paper the indescribable and perpetual fear the appellants would have to undergo, either imagined or real, if they have to live under the giant pylons that overhang their houses day in and day out after the construction is completed. Needless to say prior to the completion of these structures the appellants would already have a taste of the future bitter sufferings when they have to put up with the huge machineries and other infractions by the workers of the respondent. From pp. 555-562 are seen the effect of fallen pylons and the hazard that go with it. Evidence adduced also confirmed the negative medical effect on people, especially children who are more susceptible to leukaemia and like diseases, when bombarded by the flow of electricity passing over their houses. Yet despite these hazardous life threatening factors the respondent ventilated that money would be adequate to compensate them for their discomfort. The compensation received by the appellants is supposed to mollify the appellants for living under the pylons with all the hidden dangers which have not been explained to them. The respondent would eventually reap the benefits of their displacement without much effort and expense when the appellants eventually abandon their homes for fear of their health and lives. This subtle and unconscionable way of driving and depriving the appellants of their property, hence in effect an acquisition of their land by the respondent (a power exercisable only by the State authority), surely would contravene their constitutional rights (art. 13 of the Federal Constitution).

[13] With such a mega project in the offing, and the eventual repercussion pervading the lives of the appellants being so major, this panel was unable to agree with the stance of the respondent or the findings of the learned judge. This was not just tightening of the loose screws, repainting the posts, replacing the aging posts with new but similar types of structure, which could be accepted as upgrading, but an exercise that would witness a major emplacement of the transmission lines together with the structures holding them, and affecting the area involved in no uncertain terms. How could it be construed that the exercise of the respondent was to repair and maintain the existing posts in the ordinary sense, when the new superstructures, which would radically and fundamentally alter the landscape are now the permanent features (*A.C.T Construction Ltd v. Customs and Excise Commissioners* [1981] 1 WLR 1542). The previous posts would see no repairs being undertaken but totally dismantled and replaced, and a large area of the appellants' land by necessity, encroached when the mega project has been completed. A major upheaval in the health and lives of the appellants would undoubtedly be witnessed thereafter.

[14] The respondent canvassed the argument before us that public interest must override the grievances of the appellants. This argument, which would smack of riding rough shod over a minority's rights, though in certain circumstances may be acceptable, sounds hollow when there are other alternative ways to solve the problem. There is even evidence before us to show that, apart from the views held by the incumbent State Government, even the respondent at one point of time did agree to consider this alternative suggestion. Unfortunately for reasons not divulged satisfactorily the respondent reneged on its promise. That being so, regretfully, in the circumstances of the case this point also holds no water.

[15] One final matter that requires attention is the complaint by the respondent that the pleadings did not state anything about the notice suffering errors of law. Even if the respondent were quite right, it is trite that courts are more concerned with the justice of a matter rather than being overly concerned with format or procedure, and that being so we allowed the appellant to submit on this issue. Having scrutinised the notes of proceedings and the submissions, touched upon also by the learned judge in the

grounds of judgement, we were satisfied that at no time was the respondent caught flat-footed, or prevented from replying to this so-called unpleaded issue. At every step of the way, from the early stages of the application for leave, the stage of the interparty application before the learned judge, and eventually the rehearing before us, the respondent was sufficiently put on notice of this argument. Any submission of being caught unaware and unprepared thus was without merit (*OCBC Ltd v. Philip Wee Kee Puan* [1984] 2 CLJ 4; [1984] 1 CLJ (Rep) 25 PC; *Superintendant of Lands and Surveys, 4th Division & Anor v. Hamit b. Matusin & 6 Ors* [1994] 3 CLJ 567).

[16] With the pleading matter resolved, and what that notice entailed, together with the disproportionate sufferings to be experienced by the appellants at the hands of the respondent, by no account could it be said that it had been issued without any error of law. Based on the above reasons we therefore allowed the appeal with costs here and below and set aside the order of the learned judge. We thereupon granted order in terms of the appellants' application to encl. 1.